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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sierra)

THE PEOPLE, Plaintiff and Respondent, v. FRANCS EUGENE HANSEN, Defendant and Appellant.	C059415 (Super. Ct. No. 4211)

The trial court found defendant Francs Eugene Hansen, also known as Thomas Hansen, to be a Sexually Violent Predator (SVP). (Welf. & Inst. Code, § 6600 et seq.)[1] The trial court committed him to the Department of Mental Health (Department), and he timely appealed. On appeal, defendant contends no substantial evidence supports the SVP finding, and the SVP statutes are infirm for several reasons. We shall affirm.

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[1] Hereafter, undesignated statutory references are to the Welfare and Institutions Code.

BACKGROUND

Defendant waived his right to a jury trial, and the parties stipulated that he had two qualifying predicate offenses. At trial, the People presented the testimony and written reports of Drs. Vognsen and Owen, and defendant presented the testimony of Dr. Korpi, who had prepared a written report about defendant for a prior SVP hearing. All three were qualified psychologists with experience evaluating sexual offenders. Defendant had refused to be interviewed by the People's experts.

Defendant was born in 1932. He dropped out of the eighth grade and has an IQ of 86. His medical problems include a degenerative disc disease, for which he is not a good surgical candidate, and he uses a leg brace and cane, or a wheelchair.

In a 1967 case, apparently not resulting in conviction, defendant engaged in oral copulation and attempted intercourse with a girl, aged five. In a 1971 case resulting in a conviction, defendant had or attempted to have intercourse with a girl, aged 11, and tried to sodomize her. In a 1987 case resulting in felony convictions, he befriended a male drug abuser and molested the man's children while he was babysitting them. The children consisted of two boys, aged six and eight, and a girl, aged four.

Defendant freely discussed his actions in the above cases to investigating officers. However, he has also denied that he has a sexual interest in children.

According to Dr. Vognsen's report, a RRASOR assessment resulted in a score of 3, and a Static-99 assessment resulted in

a score of 4. These diagnostic tests "indicate that Mr. Hansen is at serious risk for sexual reoffense. . . . [¶] However, Mr. Hansen is now 74 years of age" and studies showed a significant decrease in risk after age 60. Nonetheless, considering a number of specific variables, Dr. Vognsen believed defendant presented a high risk for sexual violence, in part because of the long history of offenses, predatory offenses, offenses against both boys and girls, increasing severity of offenses, his blaming of children for the offenses, lack of insight, refusal to engage in treatment, and other factors. Dr. Vognsen testified defendant had an anti-social personality disorder and alcohol dependence, which made it more likely for him to act out "deviant sexual urges." Defendant was in increasingly poor health, including hypertension and stage one prostate cancer, and he predominately used a wheelchair. Defendant had cognitive impairments, bad memory, and was a poor communicator, with a history of lying. Using the RRASOR and Static-99 assessments, defendant scored medium or moderate high, depending on how some of his prior offenses are scored. Age is a key factor, because recidivism drops after age 60, and these tests have not been used on "any significant number of people of his age." But Dr. Vognsen also used his clinical judgment. Factors against defendant were that his offenses escalated, instead of decreased over time, he molested both boys and girls, and he never completed "a cognizant behavioral treatment program for sex offenders[.]" Therefore, defendant had a substantial risk of reoffense, despite his age and infirmities.

According to Dr. Owen's report, application of the Static-99 assessment resulted in a score of 5, placing defendant "within the medium-high risk category for sexual recidivism." However, that test "was not normed on men this old." His report also states that "Recidivism is uncommon in [rapists or child molesters] over the age of 60. Mr. Hansen is a 74-year-old man whose risk of recidivism should be declining." But defendant had not participated in available treatment while in the state hospital "so it is difficult to imagine that he would be any more interested in an outpatient program. He adamantly denies his offenses, although he has admitted them in the past. He seems to lack insight or awareness of his contradictions." He is a pedophile, and "With this diagnosis and years of offending, it is not surprising that he scores within the elevated range on the Static 99. Granted, age is a protective factor for him, but it is doubtful that age overrides other static and dynamic risk factors. Mr. Hansen has done nothing to reduce his level of risk and does not appear to be amenable to outpatient treatment. In fact, due to his diagnosed mental disorder, he poses a substantial and well-founded risk of sexual recidivism." At the hearing, Dr. Owen testified defendant was diagnosed with pedophilia, anti-social personality disorder and alcohol dependence. Even a modified Static-99, adjusted for defendant's age, reflected a medium-high risk. Defendant's prior offenses were predatory. His age and poor health were in his favor; including falls requiring him to wear a protective helmet, and use of a wheelchair. But *despite his age and* condition, he had

a substantial danger of reoffending, and was an SVP. Dr. Owen knew of no facility, except where he is currently housed, that would be a safe place to house defendant.

Dr. Korpi testified it was difficult to predict reoffense levels for offenders over age 60, and even less data was available for those over age 70. He gave alternative opinions. The first was that defendant's "likelihood to re-offend is significant, it is not low, it is moderate, moderate high, something like that." This was based on the fact that defendant tested as high risk on the "actuarial devices," that despite his age, as late as February 2006, he made statements indicating children had initiated sexual conduct, that he had many disciplinary problems during his current commitment, and that his last conviction occurred at age 55 "which is late." Dr. Korpi agreed that this opinion was consistent with Dr. Owen's opinion. Dr. Korpi's alternative opinion was based on the view that practical factors limited defendant's access to children. The first was "organic brain damage" which limited defendant's ability to care for himself. The second was his "ongoing pain issues" which included difficulty breathing, need to use a wheelchair or cane, spinal pain, and risk of falling. These problems made it unlikely he would ever be housed where he had access to children. Dr. Korpi agreed defendant needed to be in a "locked, residential" facility. Although Dr. Korpi conceded that he had evaluated defendant in 2003 and 2005 and had then concluded he remained a danger, if defendant were kept in a locked facility, he would not be a danger. In other words,

defendant was dangerous, but if he were kept away from children he could not act on his impulses. Dr. Korpi conceded defendant fell within the small number of aged offenders who posed a danger of reoffense.

The trial court noted that Dr. Korpi recognized the fact defendant committed his last offense late in life, at age 55, cut against the general expectation that the risk of reoffense wanes with age. The trial court recognized that the RRASOR and Static-99 diagnostic tools were not based on samples of aged offenders, but all the doctors recognized this and used their respective clinical judgments. The trial court found defendant to be an SVP, rejecting Dr. Korpi's alternative opinion that defendant was physically unable to molest children because his physical condition would require him to be kept in a locked facility.

DISCUSSION

I.

Defendant contends no substantial evidence supports the SVP finding because the diagnostic tools used by the experts were created with reference to younger sexual offenders, therefore their opinions lacked foundation, and defendant's age and physical condition show he is not likely to reoffend, a necessary element of the People's case.

"We review sufficiency of the evidence challenges under the SVP Act according to the same standard pertinent to criminal convictions. [Citation.] We thus review the entire record in the light most favorable to the judgment to determine whether

substantial evidence supports the determination below. [Citation.] We may not determine the credibility of witnesses, nor reweigh any of the evidence, and we must draw all reasonable inferences in favor of the judgment below. [Citation.] [¶] In order to establish that defendant was an SVP, the People must prove that . . . (3) his disorder makes it likely he will engage in sexually violent criminal conduct if released . . . ." (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52.)

Dr. Vognsen knew the diagnostic tests were not derived from large samples of older offenders, and testified that he relied on his clinical judgment in concluding that defendant was likely to reoffend. In particular, defendant molested children when he was over age 50, showing that he was in the class of sex offenders who are likely to continue their predatory behavior despite advancing age. Dr. Owen, too, knew that the diagnostic tests were not based on older offenders, but still concluded defendant was likely to reoffend. Even defendant's expert, Dr. Korpi, thought defendant posed a danger, *unless he could be kept in some sort of locked facility with no access to children*.

Given that all three doctors agreed defendant remained a threat, despite the known limitations of the diagnostic tests, as applied to older offenders, we reject defendant's contention that their opinions lacked foundation. Substantial evidence shows that despite defendant's age and poor physical condition, he is likely to reoffend. Defendant remains an SVP.

II.

Defendant contends the revisions to the SVP statutes embodied in Proposition 83, adopted at the November 7, 2006 General Election and popularly known as Jessica's Law, are invalid for several different reasons.

The California Supreme Court has granted review in a number of cases rejecting similar claims. (E.g., *People v. McKee*, S162823 [lead case]; *People v. Riffey*, S164711; *People v. Boyle*, S166167; *People v. Johnson*, S164388; *People v. Garcia*, S166682; *People v. Force*, S170831.) Defendant states he "briefly" raises such claims to preserve them.

First, we provide this general background:

"Under the SVPA, until it was amended in 2006, a person determined to be an SVP was committed to the custody of the Department of Mental Health for a period of two years and was not kept in actual custody for longer than two years unless a new petition to extend the commitment was filed. . . .

"On September 20, 2006, the Governor signed the Sex Offender Punishment, Control, and Containment Act of 2006, Senate Bill No. 1128 [SB 1128]. (Stats. 2006, ch. 337.) [SB 1128] was urgency legislation that went into effect immediately. (Stats. 2006, ch. 337, § 62.) Among other things, it amended provisions of the SVPA to provide the initial commitment . . . was for an indeterminate term. (Stats. 2006, ch. 337, § 55.) . . . [¶] . . . [¶]

"At the November 7, 2006 General Election, the voters approved Proposition 83, an initiative measure. [Citation.]

Proposition 83 was known as 'The Sexual Predator Punishment and Control Act: Jessica's Law.' [Citation.] Among other things, Proposition 83 'requires that SVPs be committed by the court to a state mental hospital for an undetermined period of time rather than the renewable two-year commitment provided for under existing law.' [Citing analysis in ballot pamphlet.]

"Proposition 83 amended . . . section 6604 in the same manner as SB 1128, changing the term of commitment to an indeterminate term and deleting all references to extended commitments in that section." (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1280-1281.)

We now address defendant's contentions.

A. Due Process

Defendant contends his indeterminate commitment under the amended SVPA violates due process because there is no longer any provision for periodic hearings to determine the propriety of continued commitment and because he has the burden to prove that he is no longer an SVP. We disagree.

"Because civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections. [Citation.] A defendant challenging the statute on due process grounds carries a heavy burden. Courts have a '"duty to uphold a statute unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity."'" (*People v. Otto* (2001) 26 Cal.4th 200, 209-210.)

Defendant begins with the premise that a civil commitment is proper only where, in addition to a finding of dangerousness, there is a finding that the person has a mental problem impairing the person's ability to control his or her behavior, citing and discussing *Kansas v. Hendricks* (1997) 521 U.S. 346 [138 L.Ed.2d 501] (*Hendricks*). He then reasons that a commitment can last only as long as the mental problem lasts, and there must be some mechanism for reevaluating the issue. He concedes two review mechanisms exist, but contends that neither is adequate to preserve an SVP's right to challenge the propriety of continued confinement.

One mechanism allows the Department to file a petition for discharge (embracing the lesser relief of conditional release), on the grounds that the SVP no longer meets the relevant SVP criteria. (§ 6605, subd. (b).) As defendant notes, the state controls the filing of a section 6605 discharge petition.

But there is also a mechanism by which an SVP can petition for discharge (or conditional release) without the concurrence of the state. (§ 6608.) Defendant concedes that a person would be entitled to counsel to prosecute a section 6608 discharge petition, but complains it does not provide for the appointment of experts, and he would have the burden of proof by a preponderance of the evidence. He also complains that the trial court can summarily deny the petition if it is found to be frivolous. For these reasons, he maintains this mechanism violates due process.

We address the trial court's ability to summarily dismiss frivolous petitions later in this opinion.

We agree with defendant that *section 6608* does not provide for the appointment of a defense expert. But we must read section 6608 in harmony with other SVP statutes. (See *People v. Cottle* (2006) 39 Cal.4th 246, 254 [court must "'harmonize the various parts of an enactment'"].) A defense expert is provided by *section 6605*, which requires the Department to provide annual reports on an SVP's mental condition. (§ 6605, subd. (a).) In conjunction with that requirement, the statute provides that an SVP "may retain, or if he or she is indigent and so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person." (*Ibid.*) Thus, if the annual report concludes the person remains an SVP, the SVP can request the appointment of an expert. The appointed expert's conclusions could be used to support a petition for discharge under section 6608.

As for the burden of proof, it is fair to allocate the burden of proof to the SVP in a hearing on a discharge petition not filed by the Department. The initial commitment hearing establishes, beyond a reasonable doubt, that the person is an SVP. It is fair to require the SVP to have the burden to prove there has been a change in his condition. "It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." (*Jones v. United States*

(1983) 463 U.S. 354, 366 [77 L.Ed.2d 694, 706]; see *People v. Sword* (1994) 29 Cal.App.4th 614, 624 [imposing burden on insanity acquittee did not violate due process]; *People v. Beck* (1996) 47 Cal.App.4th 1676, 1684 (*Beck*).) And, as defendant concedes, he has the "lowest" burden of proof, preponderance of the evidence.

To the extent defendant relies on *Foucha v. Louisiana* (1992) 504 U.S. 71 [118 L.Ed.2d 437] (*Foucha*) to support his argument, such reliance is misplaced. Foucha was found not guilty of a crime by reason of insanity (NGI). A mental hospital found that he was no longer insane, but the state kept him confined based on a finding that he was dangerous. (*Id.* at pp. 73-75 [118 L.Ed.2d at pp. 444-445].) The United States Supreme Court observed that the state did not provide Foucha with a hearing "at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous." (*Id.* at pp. 81-82 [118 L.Ed.2d at p. 449].) This statutory scheme violated due process. (*Id.* at pp. 82-83 [118 L.Ed.2d at pp. 449-450.)

The obstacle facing Foucha would not arise for defendant. If the Department's annual report concludes defendant is no longer an SVP, a discharge petition would be filed, and he would be entitled to a hearing at which the state would carry the burden to prove his continued SVP status beyond a reasonable doubt. (§ 6605, subds. (b), (d).) Regardless of the

conclusions of the annual report, defendant can petition for release and obtain a hearing at which he need only show that he is not an SVP by a preponderance of the evidence. (§ 6608, subds. (a), (i).) Thus, unlike Foucha, defendant has viable mechanisms to obtain relief if his mental condition changes.

B. Punishment Claims

Defendant raises claims based on his view that the SVP statutes *punish* a person, specifically, ex post facto, double jeopardy and cruel punishment claims.

The short answer is that an SVP proceeding is a civil proceeding, therefore these legal theories based on retroactive, repetitive or excessive *punishment* fail. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1179 (*Hubbart*); *People v. Chambless* (1999) 74 Cal.App.4th 773, 776, fn. 2.)

We recognize that an ostensibly civil proceeding could have punitive characteristics. (See *Hendricks*, *supra*, 521 U.S. at p. 361 [138 L.Ed.2d at pp. 514-515] [but "we ordinarily defer to the [L]egislature's stated intent" and party showing otherwise must present "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil'"].)

Hendricks rejected a claim that Kansas's SVP law violated ex post facto and double jeopardy principles, because the law did not inflict punishment, although Kansas SVPs could be subject to repeated commitments, potentially for life. The court listed a number of factors, including the lack of purpose to exact retribution or deter other sex offenders, who by

definition are unable or unwilling to control their urges, and the absence of a need to show scienter; the fact the procedure had some attributes of a criminal trial, such as the burden of proof beyond a reasonable doubt, did not show it was a punitive proceeding. (*Hendricks, supra,* 521 U.S. at pp. 361-365 [138 L.Ed.2d at pp. 515-517].) The court held that "incapacitation may be a legitimate end of the civil law," "especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible." (*Id.* at pp. 365-366 [138 L.Ed.2d at p. 517].)

Following *Hendricks,* the California Supreme Court found California's original SVP statutes were not punitive because they "cannot be meaningfully distinguished for ex post facto purposes from the Kansas scheme." (*Hubbart*, *supra*, 19 Cal.4th at p. 1175; accord *People v. Yartz* (2005) 37 Cal.4th 529, 536 ["'an SVPA commitment proceeding is a special proceeding of a civil nature'"].) Concerning the length of an individual's commitment in particular, *Hubbart* noted, "nothing in *Hendricks* purports to limit for ex post facto purposes the precise length of time during which dangerously disordered persons may be confined, or the particular procedural circumstances under which they may be released. In rejecting Hendricks's claim that the scheme imposed punishment because confinement was 'potentially indefinite,' the court made clear that the critical factor is whether the duration of confinement is 'linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to

others.'" (*Hubbart*, *supra*, 19 Cal.4th at p. 1176.) Under Proposition 83, the length of a defendant's commitment is directly linked to the purpose of such commitment, and an SVP whose condition changes to the point that she or he is no longer at risk of reoffense will be released.

Proposition 83 states in part that it is "'the intent of the People of the State of California in enacting this measure to strengthen and improve the laws that punish and control sexual offenders.'" (*Bourquez*, *supra*, 156 Cal.App.4th at p. 1282.) Proposition 83 changed punishment *and* control of sex offenders. Part of Proposition 83 was punitive—such as increasing the sentences for some sex crimes—but none of those changes have been applied to defendant. The only parts of Proposition 83 applied to defendant are the changes regarding *control* of sex offenders, notably the change providing for indeterminate civil commitments. The fact that *some* provisions of Proposition 83 increased the punishment imposed on sexual offenders—provisions not applied to defendant—does not mean the purpose behind *all* of its provisions was punitive.

Defendant has not shown that the amended SVP statutes are punitive *in effect* so "'"as to negate"' the stated intent." (*Hubbart*, *supra*, 19 Cal.4th at p. 1172.) The fact that commitments are now for an indeterminate term does not render the statutes punitive. "Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others."

(*Hendricks*, *supra*, 521 U.S. at p. 363 [138 L.Ed.2d at p. 516].) Defendant's complaint that the list of qualifying offenses was expanded, and the number of past offenses to be proven was reduced from two to one, is unremarkable. Those changes advance the purpose of Proposition 83, to strengthen commitment procedures, and do not change its essential purpose, which is to confine persons who have been found beyond a reasonable doubt to pose a danger of reoffense, to protect the public. Those changes were not punitive.

Because we conclude defendant has not shown that the amended SVPA is punitive, we reject his ex post facto, double jeopardy, and cruel and unusual punishment claims.

C. Equal Protection

Defendant contends that the amended SVP statutes violate equal protection because persons committed under the Mentally Disordered Offender Act (MDOs) (Pen. Code, § 2960 et seq.) and persons committed because they were found not guilty by reason of insanity (NGIs) (*id.*, § 1026 et seq.) are not subject to indeterminate commitments and can obtain "meaningful" judicial review of their commitments. We conclude no equal protection violation has been shown.

Taking the last point first, we have already explained that SVPs have a "meaningful" mechanism for judicial review, one that provides for the appointment of counsel, an expert witness, and a hearing. To the extent defendant's brief may be read to raise the claim that casting the burden of proof on him at such hearing violates equal protection, he lacks standing to make

such claim at this time. At the hearing in *this* case the People had the burden of proof. (See *People v. Garcia* (1999) 21 Cal.4th 1, 11-12 [defendant lacked standing to assert hypothetical equal protection claims of other felons].)

As for the claim that persons committed as MDOs and persons found NGI are not subject to indeterminate commitments, that, of itself, does not establish an equal protection violation. While equal protection requires that persons similarly situated be similarly treated (see *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155 (*Buffington*)), "[t]he state 'may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of power.'" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1217 (*Hubbart II*).)

The first question in an equal protection analysis is whether the groups being compared are similarly situated, because if they are not similarly situated, the challenge fails at the threshold. (*Buffington*, *supra*, 74 Cal.App.4th at p. 1155; see *Grossmont Union High School Dist. v. State Dept. of Education* (2008) 169 Cal.App.4th 869, 892 ["The essence of an equal protection claim is that two groups, similarly situated with respect to the law in question, are treated differently"].)

Cases construing the pre-Proposition 83 version of the SVP statutes considered and rejected claims that SVPs were similar

to persons committed as MDOs or persons found NGI, with respect to the definition of mental disorder, evidence required for commitment, and provision of treatment. (*Hubbart II*, *supra*, 88 Cal.App.4th at pp. 1216-1222; *Buffington*, *supra*, 74 Cal.App.4th at pp. 1155-1164.) Defendant provides no reasoned analysis explaining why, for purposes of length of commitment or contours of review mechanism, SVP's are similarly situated to either group.

He asserts that "SVP defendants and MDO defendants are both committed for treatment because they represent a danger to the public because of a mental disorder." Defendant paints with far too broad a brush. "[T]he MDO law targets persons with severe mental disorders that may be kept in remission with treatment [citation], whereas the SVPA targets persons with mental disorders that may never be successfully treated." (*Hubbart II*, *supra*, 88 Cal.App.4th at p. 1222.) This point was emphasized by the People in adopting Proposition 83, which includes the finding that sex offenders "are the least likely to be cured and the most likely to reoffend . . . . Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon." (Historical and Statutory Notes, 47C West's Ann. Pen. Code (2008 ed.) foll. § 209, p. 52.) The higher recidivism rate of sex offenders makes them unlike persons committed as MDOs; therefore, we conclude they are not similarly situated. As we said in rejecting an analogous claim, "The MDO Act considers, at least in part, past evaluation and treatment, while the SVPA considers only the likelihood of

future sexually violent criminal behavior without commitment. [Citations.] Prisoners who suffer from conditions that may with treatment be kept in remission are the target of the MDO Act, whereas the SVPA covers prisoners whose conditions pose a risk of future sexually violent criminal behavior and who may never be completely treated. [Citations.] Given these contrasting backgrounds and expectations related to treatment, we cannot say the two groups are similarly situated in this respect for equal protection purposes." (*Buffington*, *supra*, 74 Cal.App.4th at pp. 1162-1163; see *Beck*, *supra*, 47 Cal.App.4th at pp. 1686-1687 [persons found NGI not similarly situated to persons committed as MDOs or civil committees].)

Defendant makes no specific argument explaining why SVPs and persons found NGI are similarly situated. A person found NGI is committed upon the jury's verdict. (Pen. Code, § 1026, subd. (a).) A hearing cannot be held on an application for release until he or she has been confined or placed on outpatient status for at least 180 days. (*Id.*, § 1026.2, subds. (a) & (d).) In contrast, an SVP is not committed until a trier of fact finds beyond a reasonable doubt that the person *is* an SVP. Then, as we have explained, the SVP has the right to judicial review of a nonfrivolous petition for discharge (or conditional release). Further, the commitment of a person found NGI is partly dependent on the maximum term of imprisonment that could have been imposed if the person had been found guilty. (Pen. Code, § 1026.5, subd. (a)(1).) If found to represent a substantial danger of physical harm to others by reason of a

mental disorder, a person found NGI can be recommitted for two years, akin to the former SVP commitment period. (*Id.*, § 1026.5, subd. (b)(8).) But an SVP's indeterminate commitment is not linked in any way to past crimes, but to his present danger, and when an SVP no longer meets the statutory definition, she or he can petition for release.

Given the lack of cogent analysis from defendant explaining how persons found NGI are similarly situated to SVPs, except for the broad fact that both have mental problems, we reject his claim that SVPs and persons found NGI are similarly situated.

Because defendant has not articulated how he is similarly situated to either a person committed as an MDO or a person found NGI, he has not met the threshold showing required to make out an equal protection violation. (*Buffington*, *supra*, 74 Cal.App.4th at p. 1162.)

D. Access to Courts

Defendant asserts that statutory limits on his ability to challenge whether he remains an SVP impair his First Amendment right to petition the government.

We agree that "Inmates are guaranteed the right to adequate, effective and meaningful access to the courts under the Fourteenth Amendment." (*In re Grimes* (1989) 208 Cal.App.3d 1175, 1182.) "The right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647 (*Scientology*), disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th

53, 68, fn. 5.) Defendant, however, fails to show that the amended SVP statutes violate that right.

Defendant complains that he can file a discharge petition *under section 6605* if and only if the Department determines he is no longer an SVP. This is irrelevant because defendant concedes he can file a petition *under section 6608* without such determination by the Department.

To the extent defendant contends a section 6608 petition denies him meaningful access to the courts, we disagree. He contends there is no provision for appointment of a medical expert, the trial court can summarily deny the petition without a hearing if the court determines it is frivolous, and the SVP bears the burden of proof.

We have already addressed the first and last of these points earlier in this opinion: In short, we concluded that the statutory scheme does provide for the appointment of an expert, and the fact the SVP bears the burden of proof--by a preponderance of the evidence--is appropriate.

The trial court must "determine if [the petition] is based on frivolous grounds, and, if so, shall deny the petition without a hearing." (§ 6608, subd. (a).) As used in this statute, "frivolous" imports the same standard as that used to determine if a pleading or appeal is frivolous, that is, taken solely for an improper motive such as harassment or delay, or based on grounds that any reasonable attorney would find totally without merit. (*People v. Collins* (2003) 110 Cal.App.4th 340, 349-350.) A trial court's determination *not* to hold a hearing

because the petition is frivolous is subject to review by a higher court. (*Id.* at pp. 351-352 [reversing trial court's determination that Collins's petition was frivolous].)

Defendant does not have the right to an evidentiary hearing on a petition that is *frivolous*. (See *Scientology*, *supra*, 42 Cal.App.4th at p. 648, fn. 4 [right to petition provides "little or no protection for baseless litigation or sham or fraudulent actions"]; see also generally, *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, esp. pp. 60-61 [upholding vexatious litigant statutes, in part providing for review of trial court's determination].) In the context of a habeas corpus proceeding, a type of petition for redress entitled to explicit constitutional protection, it is permissible to summarily deny a petition that does not clearly state facts showing entitlement to relief. (See *In re Swain* (1949) 34 Cal.2d 300, 303-304.) We see no reason why an SVP should be entitled to a futile hearing on a frivolous petition, when other pleaders must state a colorable claim for relief.

Accordingly, we reject defendant's challenge to Proposition 83 based on his right of access to the courts.

E. Single Subject Rule

Defendant contends Proposition 83 violates the single-subject rule, which forbids initiative measures from "embracing more than one subject[.]" (Cal. Const., art. II, § 8, subd. (d).) We disagree for two reasons.

First, without describing all of the changes it made, the ballot summary prepared by the Attorney General stated

Proposition 83 would increase the punishment for violent and habitual sex offenders, impose residency restrictions on registered sex offenders, provide for GPS tracking of some sex offenders, expand the definition of an SVP and provide for indeterminate commitments subject to annual review by the Department, or challenge by petition of the SVP. (Ballot Pamp., Gen. Elec. (Nov. 7, 2006) Official Title and Summary of Prop. 83, p. 42.) Defendant does not argue that any of the changes made by Proposition 83 do not fall into these general categories, he simply lists many of the specific statutes that are altered by the amendment. But because all of these changes are "reasonably germane" to the subject of controlling sex offenders (see *Legislature v. Eu* (1991) 54 Cal.3d 492, 512), Proposition 83 does not violate the single subject rule.

Second, as the People point out, even if we concluded Proposition 83 violated the single-subject rule, defendant's indeterminate commitment would remain lawful under SB 1128. The single-subject rule applies to and only to an "initiative measure[,]" a term of art that does not include statutes passed by the Legislature. (Cal. Const., art. II, § 8, subd. (d); see *Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, 20-23.) Defendant's only mention of this point is a footnote observing that Proposition 83 "superseded" SB 1128. But if Proposition 83 is invalidated, it could not "supersede" the prior law, which would remain in effect, and which provided for indeterminate commitments. (Stats. 2006, ch. 337, § 55; see *People v. Shields* (2007) 155 Cal.App.4th 559, 562–563 [upholding

indeterminate commitment imposed during window between SB 1128 and Proposition 83, noting the relevant language of each was identical].) Therefore, if Proposition 83 violated the single-subject rule, we would not grant defendant relief from his indeterminate commitment.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

RAYE, Acting P. J.

BUTZ, J.